Air Line Pilots Association *and* ABX Air, Inc. Case 9–CC–1660

August 27, 2005

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND SCHAUMBER

On July 2, 2004, Administrative Law Judge Joseph Gontram issued the attached decision. The Respondent filed exceptions and a supporting brief. The Charging Party filed an answering brief.[1] The Respondent filed a reply brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions.

As discussed in greater detail in the judge's decision, this case involves three parties: the Respondent—Air Line Pilots Association, the Charging Party—ABX Air, Inc., and DHL.[2] The parties' dispute centers on whose pilots should fly the cargo handled by Airborne, Inc. after its merger with DHL. Prior to the merger, ASTAR (formerly DHL Airways) pilots flew DHL cargo and ABX (formerly Airborne) pilots flew Airborne cargo. After the merger, the Respondent sought to extend its contractual status as the exclusive source of pilots for DHL to cover both DHL and Airborne.

This dispute requires us to determine whether Respondent's attempted extension runs afoul of the Act's prohibition on secondary activity. The Respondent claims that it was simply attempting to obtain the benefit of its bargain with DHL that it would be the corporation's exclusive source of pilots. According to the Respondent, once Airborne became a part of DHL's corporate structure, DHL's contractual obligation to use the Respondent's pilots extended to Airborne. The judge disagreed and found that the Respondent's objective to force DHL to use the Respondent's pilots for flying both DHL and Airborne freight necessarily required DHL to cease doing business with ABX. The judge concluded that this cessation of business had no work preservation objective, and therefore Respondent's conduct violated the Act. For the reasons expressed below, we agree with the judge.

Facts

DHL provides overnight package delivery services to its customers. DHL Airways, a wholly-owned subsidiary of DHL, provided both ground and air operations for DHL. The ground operations included the pickup, sorting, loading, and delivery of freight. The air operations included flying freight between the 33 cities serviced by DHL, which freight was then delivered to customers by the ground operation. DHL Airways' base of operations was the Cincinnati/Northern Kentucky International Airport.

The Respondent primarily represents airline pilots in collective-bargaining relationships with airlines. In 1990, the National Mediation Board certified the Respondent to represent pilots employed by DHL Airways.

In 1998, the Respondent entered into a collective-bargaining agreement with DHL Airways. The agreement, and other implementing agreements, provided that all flying performed on behalf of DHL Airways, DHL, or their successors would be performed by pilots whose names appeared on DHL Airways' pilot seniority list. Respondent represented those pilots.

In 2001, DHL was acquired by a foreign entity. Because of prohibitions on foreign ownership of U.S. airlines, DHL spun off the air operations of DHL Airways as a separate, U.S.-owned entity. DHL Airways' ground operations remained a wholly-owned subsidiary of DHL. Thus, the employees who provided the pickup, sorting, loading, and delivery services remained employees of DHL. The employees involved in the air operations, including the pilots, however, became employees of a separate company, DHL Airways. DHL Airways, which later changed its name to ASTAR, entered into a contractual relationship with DHL to provide the same air operations that it had provided when it was a subsidiary of DHL.

In 2003, DHL entered into a merger agreement with its competitor Airborne, Inc. Airborne's operations included both ground and air services. Airborne utilized a hub system for moving freight around the country, maintaining a principal hub in Wilmington, Ohio and 11 regional hubs. Airborne flew planes in and out of approximately 105 cities, through the hub airports. Airborne's pilots were represented by the International Brotherhood of Teamsters, Local 1224.

Because of DHL's foreign ownership, DHL's acquisition of Airborne required that Airborne spin off its air operations. The air operations became a separate entity, ABX Air, Inc.—the Charging Party. Airborne's ground operations became a subsidiary of DHL, called Airborne.

[1] The General Counsel's answering brief was not accepted by the Board because it was not timely filed.

[2] DHL's corporate structure underwent a number of changes during the relevant time period, with accompanying name changes. Those changes are addressed herein as necessary. The judge describes the evolution of the company in greater detail in his decision. We refer to it herein simply as DHL.

Thus, after the merger, the pilots who had previously worked for Airborne became ABX employees and Airborne's ground operations employees became employees of the DHL subsidiary, Airborne. ABX entered into a contractual relationship with Airborne to provide the same air operations that it had provided prior to the merger.

Although the merger altered their corporate structures, DHL and Airborne continued to operate their businesses in the same fashion as before the merger. The ASTAR pilots represented by Respondent continued to fly to the same airports, using the same airplanes, and carrying the same DHL-handled freight as before the merger. Likewise, ABX pilots continued to be represented by the Teamsters, and continued to fly freight handled by the same Airborne employees, in and out of the same airports, using the same airplanes as before the merger.

On August 7, 2003, the Respondent filed a grievance against DHL, alleging that the implementation of the ABX-Airborne contract for air operations violated its collective-bargaining agreement with ASTAR, to which DHL was bound. On August 11, DHL filed a declaratory judgment action in Federal district court, seeking a judgment that the ABX-Airborne contract did not violate any of the parties' agreements. The Respondent filed a counterclaim seeking expedited arbitration of its grievance and an injunction restraining DHL and its subsidiaries, including Airborne, from contracting with ABX for air operations services.[3]

Analysis

1. The threshold issue before us is whether the judge properly found that the Board has jurisdiction over this dispute. The Respondent and our dissenting colleague concede that the Respondent meets the definition of a labor organization.[4] Because Section 8(b)'s prohibition on secondary activity expressly extends to Section 2(5) labor organizations, it follows that the Respondent is covered by Section 8(b)'s dictates. The Respondent and our dissenting colleague contend, nevertheless, that the Board does not have jurisdiction because this dispute is in essence a Railway Labor Act dispute. We agree with the judge, to the contrary, that the Board has jurisdiction.

The status of the relevant parties is uncontested. The Respondent concedes that it meets the Act's definition of a labor organization and does not dispute that DHL and Airborne are employers subject to the Act's jurisdiction. Similarly, the General Counsel does not dispute that ASTAR and ABX are not employers under the Act and that their pilots are not statutory employees under the Act. Rather, they are subject to the Railway Labor Act (RLA), which covers air carriers and their employees. 45 U.S.C. § 181. At issue, therefore, is whether the Board has jurisdiction where the dispute involves some parties who are subject to the Act's jurisdiction and some who are not.

The Respondent and our dissenting colleague argue that because this dispute centers on the question of which of two groups of RLA-covered employees is entitled to provide air operation services to DHL, the Board does not have jurisdiction.[5] In support of their contention that the Board lacks jurisdiction, they rely primarily on the Supreme Court's decision in *Railroad Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369 (1969). We agree with the judge that *Jacksonville Terminal* is inapposite.

In *Jacksonville Terminal*, as in this case, the union represented employees covered by both the RLA and the NLRA. The employees at issue were, like the employees here, the union's RLA-covered members. The two employers involved in *Jacksonville Terminal* also were RLA-covered entities. Thus, the dispute's nexus with the NLRA was limited to the union's representation of employees not implicated in the dispute in question. In those circumstances, the Supreme Court held that even though the union met the NLRA's definition of a labor organization, the Board lacked jurisdiction because the dispute at issue was "a railway labor dispute, pure and simple."

In contrast to the dissent, we do not read *Jacksonville Terminal* as counseling against an assertion of jurisdiction because the dispute here is not a "pure" RLA dispute. Although both sets of employees involved—the

[3] In deference to the Board's proceedings, the district court has stayed further proceedings until the issuance of this decision.

[4] Although the overwhelming majority of the Respondent's members are not employees under the Act because they are employed by air carriers covered by the Railway Labor Act, the Respondent acknowledges that it represents a unit of pilots who are employees under the Act because they are employed by Ross Aviation, an employer under the Act. Therefore, the Respondent meets the Act's definition of a labor organization. See *Master, Mates & Pilots Local 47 (Chicago Calumet Stevedoring Co.)*, 125 NLRB 113, 132 (1959) (workers involved in dispute need not be employees under the Act, as long as putative labor organization represents some employees under the Act); see also *Douglas Aircraft Co.*, 221 NLRB 1180 (1975), remanded on other grounds sub nom. *Mourning v. NLRB*, 559 F.2d 768 (D.C. Cir. 1977) (ALPA is a labor organization).

At one point, our colleague "assumes" that ALPA is a labor organization under Sec. 2(5) of the Act. At another point, our colleague says that ALPA itself concedes that it is a labor organization "for some purposes." We are not aware of any case which holds that an entity can be a labor organization for some purposes under the Act and not for other purposes under that same Act. The language of the Act is plain. Once an entity is found to be a labor organization, it is subject to all of the prohibitions of Sec. 8(b) of the Act.

[5] There is no dispute that the Respondent's members who are covered by the Act—the Ross Aviation pilots—have no connection to this dispute.

ASTAR and ABX pilots—are covered by the RLA, only one of the two employers—ABX—is. Whereas in *Jacksonville Terminal*, all the participants in the dispute were covered by the RLA, including both employers, here one of the employers—DHL—is covered by the NLRA and DHL is the object of the Respondent's allegedly unlawful coercion. The judge, therefore, correctly concluded that *Jacksonville Terminal* does not compel a finding that the Board lacks jurisdiction. See also *Electrical Workers (B. B. McCormick & Sons)*, 150 NLRB 363 (1964), enfd. 350 F.2d 791 (D.C. Cir. 1965), cert. denied 383 U.S. 943 (1966) (Board has jurisdiction where the primary employer was covered by the RLA, the neutral employer was covered by the NLRA, and the employees at issue were covered by the RLA and represented by a union that represented both RLA and NLRA employees).

In order to fit this case into the *Jacksonville Terminal* holding and her characterization of the case as essentially alien to the Act, our dissenting colleague restricts her view to the primary dispute between the Respondent and ABX. If, in fact, the dispute was so limited, her characterization would have much greater credibility. The Respondent, however, chose to enmesh DHL, an NLRA-covered employer, in its dispute. The essence of the dispute, which we have been asked to resolve, therefore, is not between only RLA-covered entities. Rather, ALPA (an NLRA-covered labor organization) chose to enmesh DHL (an NLRA-covered employer) in its dispute with ABX (an RLA employer).[6] The Respondent's extension of the dispute to an NLRA-covered employer distinguishes this case from *Jacksonville Terminal* and undermines the dissent's unduly narrow characterization of the dispute.

Our dissenting colleague characterizes the issue here as a conflict between two statutory regimes. The dissent fails to explain, however, why the Board should decline its role in enforcing the Act and defer to the RLA. The fact remains that the Respondent brought itself within the Board's jurisdiction by choosing to represent employees covered by the Act. Moreover, we do not see how enforcing the Act's secondary boycott prohibition subverts the RLA. Although the RLA does not proscribe secondary activity, neither was it enacted to promote it.[7] Accordingly, the plain meaning of the NLRA is our best guide in determining whether or not to assert jurisdiction.

Because the plain meaning of the applicable statutory provisions undisputedly pertain to the Respondent and because the Respondent and our dissenting colleague have failed to provide any persuasive authority otherwise, we assert the Board's jurisdiction to adjudicate the question of whether the Respondent engaged in unlawful secondary activity by pursuing its grievance and counterclaim against DHL in order to block Airborne's contract with ABX.

2. We also adopt the judge's finding that the Respondent's pursuit of its grievance and counterclaim constituted unlawful secondary conduct. We find that the object of the Respondent's conduct was to require DHL and its subsidiary Airborne to cease doing business with ABX, in violation of Section 8(b)(4)(ii)(A) and (B) and 8(e).

> Section 8(b)(4)(ii)(A) and (B) makes it unlawful for a union to "threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce" in furtherance of certain unlawful objects, which include "(A) forcing or requiring any employer . . . to enter into any agreement which is prohibited by Section 8(e) [and] (B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person. . . ."

Section 8(e) makes it unlawful for an employer and a union to "enter into" an agreement expressly or implicitly requiring the employer "to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or cease doing business with any other person."

The Respondent's grievance and counterclaim have the clear object of forcing DHL/Airborne to cease doing business with ABX. On its face, therefore, the Respondent's conduct is unlawful.

Our analysis, however, must go deeper. As the Supreme Court has held, even if a contractual provision has a cease-doing-business object, it is lawful if it or its enforcement "is addressed to the labor relations of the contracting employer vis-à-vis his own employees." *National Woodwork Manufacturers Assoc. v. NLRB*, 386 U.S. 612, 645 (1967). Thus, where a union's conduct has a work preservation object, it is primary, lawful activity. For example, in *National Woodwork Manufacturers*, the literal object of the union's agreement with the employer, which prohibited the use of premachined doors at the worksite, was to force the employer to cease

[6] Under the language of the 1959 amendment, Sec. 8(b)(4)(B) is violated even if the primary employer and the neutral employer are non-NLRA employers.

[7] The Supreme Court has admonished the Board for failing to defer to other statutory schemes where enforcement of the Act "trenches upon" the critical aspects of the conflicting statutory purpose. See *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 147, 151 (2002). Assertion of jurisdiction here does not trench upon the critical purpose of the RLA.

doing business with the manufacturers of premachined doors. Nevertheless, the Supreme Court found that the agreement did not violate the Act because the object of the agreement was to preserve manual door-hanging carpentry work for the union's members.

In assessing whether conduct has a work preservation object, the Board looks to whether the work at issue is "fairly claimable" by the union. See, e.g., *Sheet Metal Workers Local 26 (Reno Employers Council)*, 168 NLRB 893, 897 (1967); *Retail Clerks Local 1288 (Nickel's Pay-Less)*, 163 NLRB 817, 818–819 (1967), enfd. 390 F.2d 858 (D.C. Cir. 1968). As the Board has found, work is "fairly claimable" where it is "identical to or very similar to that already performed by the bargaining unit and that bargaining unit members have the necessary skill and are otherwise able to perform." *Newspaper & Mail Deliverers (Hudson News)*, 298 NLRB 564, 566 (1990).

Where the union's object is work acquisition, rather than work preservation, an unlawful secondary object will be found. See, for example, *Service Employees Local 32B-32J (Nevins Realty)*, 313 NLRB 392, 399–400 (1993), enfd. in relevant part 68 F.3d 490 (D.C. Cir. 1995). As the Board has repeatedly held, contract clauses which have a purpose "to acquire for bargaining unit employees work which has traditionally been performed by employees of other employers" are not "designed to protect the wages and job opportunities of unit employees" and, as such, "are considered as having an unlawful secondary effect." *Teamsters (California Dump Truck Owners)*, 227 NLRB 269 (1976). The Supreme Court in *National Woodwork* specifically distinguished the circumstances there from cases where the union's object is "to reach out to monopolize jobs or acquire new job tasks when their own jobs are not threatened." 386 U.S. at 630–631.

Here, we find that the Respondent's grievance and counterclaim are unlawful because they have a work-acquisition, as opposed to a work-preservation, object. Respondent, through its grievance and court counterclaim, is seeking work for its members that is different from the work that they have historically performed. For example, the ASTAR pilots service airports in approximately 33 cities, whereas the ABX pilots service more than 100 cities. In addition, the ABX pilots use a hub system, with Wilmington, Ohio as its central hub. The ASTAR pilots never fly to Wilmington. The ASTAR and ABX pilots fly different models of aircraft. The ASTAR pilots fly in 3-person crews, as required by the aircraft they use, whereas the ABX pilots primarily use 2-person crews. Finally, the volume of freight handled by the two sets of pilots is very different. ASTAR pilots transport approximately 900,000 pounds of freight per day. ABX pilots transport 8.5 million pounds per day.

Moreover, the Respondent's ASTAR members have never performed air operations for Airborne. If the Board permitted the Respondent's grievance and counterclaim to proceed and they were successful, the Respondent's members would perform this work for the first time. Accordingly, the Respondent's conduct cannot be understood to be preserving the Respondent's members' work and is not fairly claimable.

A comparison of this case with the hallmark cases in this area makes clear the difference between the Respondent's object and true work preservation provisions. As discussed above, in *National Woodworkers Association*, the Supreme Court found lawful a contract provision prohibiting the employer from contracting with premachined door manufacturers. There, the employees historically had hand-hung new doors. The purpose of the contract provision at issue was to prohibit the employer from taking advantage of new technology that enabled manufacturers to offer prehung doors that obviated the need for carpenters at the site to install doors by hand.

Similarly, the impact on the bargaining unit of a technological innovation was at issue in the Supreme Court's *Longshoremen* cases. See *NLRB v. Longshoremens ILA*, 473 U.S. 61 (1985); *NLRB v. Longshoremens ILA*, 447 U.S. 490 (1980). There, the union contracted with the employers to preclude employers from fully utilizing a new container freight system. The containerization of freight threatened to directly replace the union's members' services. The Supreme Court held that, despite the obvious cease-doing-business object of the contract provisions, the union was entitled to preserve its members' historical purview.

The Respondent has no such historical claim to performing Airborne's air services. As discussed above, the Respondent's members have historically provided air services to DHL, not Airborne. Moreover, the ASTAR pilots do not risk losing their jobs, as the employees at issue in *National Woodwork* and the *Longshoremen* cases did, if the Respondent is not permitted to enforce the disputed contract provision. Indeed, the result of the Respondent's success would be to create a large number of new jobs for ASTAR. The record demonstrates that the ASTAR pilots would have difficulty fulfilling Airborne's needs because acquisition of the Airborne contract would represent an overwhelming influx of work.

The Respondent's attempt to obscure the fact that the outcome of the Respondent's grievance and counterclaim would be an expansion of work for the Respondent's members is unavailing. By expansively defining the

historical scope of its members' work, the Respondent argues that its actions do not effectuate a change in that scope. Thus, the Respondent defines the scope of its historical claim to work as air services for all of DHL. Because Airborne is now part of DHL, the Respondent argues that its air services are a part of the Respondent's historical scope of work. The Respondent ignores, however, that at the time it filed its grievance and counterclaim, Airborne, although a wholly-owned subsidiary, was a separate employer for whom the Respondent's members had never performed work. Indeed, the Respondent never has alleged that Airborne and DHL were a single employer or alter egos. See *Masland Industries*, 311 NLRB 184, 186 (1993) (noting that single employer finding does not necessarily follow from parent/wholly-owned subsidiary relationship).

Concededly, where a union represents employees who perform work for an employer, it can lawfully claim the same kind of work when it is performed by additional employees of the same employer. By contrast, in the instant case, the Respondent represents employees who perform work for ASTAR and it is claiming different work historically and currently performed by a different employer (ABX). Accordingly, the consequence of the Respondent's grievance and counterclaim, if successful, would be the acquisition of work, not preservation. See *Teamsters Local 282 (D. Fortunato, Inc.)*, 197 NLRB 673, 678 (1972) (work historically performed by employees in other work units is not fairly claimable).

3. Finally, we find, contrary to the Respondent's exception, that the judge's recommended remedy is within the Board's discretion. The judge recommended that the Board order the Respondent to reimburse DHL for "all reasonable expenses and legal fees, with interest, incurred in defending against the grievance and counterclaim." Reimbursement is the appropriate remedy where the Respondent has engaged in actual coercion. See *Food & Commercial Workers Local 367 (Quality Foods)*, 333 NLRB 771 (2001); *Service Employees Local 32B-32J (Nevins Realty)*, supra, 313 NLRB at 403. We clarify, however, that the Respondent is not liable for legal expenses related to DHL's initiation of the district court litigation. The Respondent is liable only for expenses related to defending against its grievance and counterclaim.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Air Line Pilots Association, Washington, D.C., its officers, agents, successors, and assigns, shall take the action set forth in the Order.

Dated, Washington, D.C. August 27, 2005

Robert J. Battista, Chairman

Peter C. Schaumber, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER LIEBMAN, dissenting in part.

This case involves a dispute between ABX, an air carrier, and ALPA, a pilots' union, concerning the rights of ALPA-represented pilots. Nevertheless, because 17 of the more than 62,000 pilots that ALPA represents are employed by an employer covered by the National Labor Relations Act—an employer in no way involved in this dispute—the majority claims that the dispute is properly adjudicated under the NLRA, and not the Railway Labor Act. I dissent.

In *Railroad Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369 (1969), a group of railroad unions picketed a railroad terminal in support of a labor dispute between the unions and one of the railroads using the terminal. There was no dispute that the railroad, the terminal, and the affected employees were all covered by the RLA. However, a "small percentage" (id. at 375) of the railroad unions' membership consisted of employees covered by the NLRA, not the RLA, and, on that basis, the terminal asserted that the dispute should be adjudicated under the NLRA. The Supreme Court rejected that argument:

> The NLRA came into being against the background of pre-existing comprehensive [F]ederal legislation regulating railway labor disputes. Section 2(2) and (3) of the NLRA, 29 U.S.C. § 152(2), (3), expressly exempt from the Act's coverage employees and employers subject to the Railway Labor Act. And when the traditional railway labor organizations act on behalf of employees subject to the Railway Labor Act in a dispute with carriers subject to the Railway Labor Act, the organizations must be deemed, *pro tanto*, exempt from the National Labor Relations Act.

Id. at 376–377 (footnote omitted).[1]

[1] The Court was unmoved by the fact that the unions were engaged in what, if the case were adjudicated under the NLRA, would arguably have been a secondary boycott. Id. at 377 fn. 10, 386–393. The Court observed:

> No cosmic principles announce the existence of secondary conduct, condemn it as an evil, or delimit its boundaries. These tasks were first undertaken by judges, intermixing metaphysics with their notions of social and economic policy. And the common law of labor relations has . . . drawn no lines more arbitrary, tenuous, and shifting than those separating "primary" from "secondary" activities.

The same principle applies here. I am willing to assume, for purposes of discussion, that ALPA is a "labor organization" within the meaning of the NLRA. After all, .027 *percent* of the pilots it represents are Section 2(3) "employees."[2] And there is no disputing that DHL, the alleged secondary in this case, is a Section 2(2) "employer." But the primary controversy here is between ALPA and ABX, which is not an NLRA employer, and it concerns the rights of pilots who are not NLRA employees. That controversy quintessentially arises under the RLA, which does not forbid secondary activity in furtherance of a labor dispute. The controversy is not one that the National Labor Relations Board should decide.

According to the majority, this case is distinguishable from *Jacksonville Terminal*, because that was a "railway labor dispute, pure and simple." *Jacksonville Terminal* at 377. But that language, used by the Court in its summation of the discussion, does not represent the holding of the Court. The Court was dealing with a controversy that did not fall neatly within the jurisdiction of the NLRA or the RLA. What the Court held was that a dispute between an RLA carrier and RLA union over the rights of RLA employees was "pro tanto," i.e., "to that extent," an RLA dispute. At a minimum, that holding strongly counsels that the Board refrain from asserting jurisdiction over this case.[3]

The majority nevertheless asserts that the NLRA, by its "plain meaning," governs this case because we allegedly have present a labor organization, a secondary employer, and a primary "person" (ABX), who need not be a statutory employer. But one could equally well say that the dispute arises under the RLA, by *its* plain meaning, because we have present an RLA "carrier" and "representative."[4] The real question here is one of accommodating two statutory regimes, the NLRA and the RLA, both of which at least arguably govern the dispute. That question cannot be decided solely by reference to the statutory terms.[5]

Ultimately, the sole authority the majority cites in support of their determination to assert jurisdiction is *Electrical Workers (B. B. McCormick & Sons)*, 150 NLRB 363 (1964), enfd 350 F.2d 791 (D.C. Cir. 1965). That case bears no relation to the present dispute. *Electrical Workers* concerned a labor action undertaken jointly by the Machinists, the IBEW, the Boilermakers, the Sheet Metal Workers, the Railroad Telegraphers, and the Brotherhood of Maintenance of Way. Id. at 372. The Board observed that the membership of the first four of those unions "is comprised overwhelmingly of nonrailroad employees." Id. at 371. The Board asserted jurisdiction over the two railway unions, which it found were not statutory "labor organizations," only because they acted as "agents" for the other four in a "joint venture." Id. 372–374. In any event, the case predates the Supreme Court's decision in *Jacksonville Terminal*, and is therefore of dubious precedential value for the proposition for which it is asserted.

In sum, the essence of the dispute in this case is between an RLA-covered employer and an RLA-covered union, concerning RLA-covered, union-represented employees. A Federal court lawsuit to adjudicate the private parties' respective rights under the RLA is pending. The majority advances no persuasive reason or authority

Id. at 387–388. Quoting that language approvingly in *Burlington Northern Railroad v. Bhd. of Maintenance of Way Employees*, 481 U.S. 429 (1987), the Court squarely held that the RLA does not outlaw secondary activity.

[2] ALPA takes the position that it is not, for purposes of this proceeding, a statutory labor organization. Although the majority asserts that "it is not aware of any case" standing for the proposition that an entity can be a labor organization for some purposes under the NLRA but not others, that appears to be the majority's way of saying that the Board has never ruled one way or the other on the issue.

In any event, the majority's argument that ALPA should be deemed a labor organization here is only tenuously supported by the cases it cites. Prior to the decision in *Masters, Mates & Pilots Local 47 (Chicago Calumet Stevedoring Co.)*, 125 NLRB 113 (1959), the union involved in that case had, unlike ALPA, often sought bargaining rights under the auspices of the NLRB. Id. at 132. In addition, unlike ALPA's claim here, the union's claim in that case was not that the controversy was subject to the exclusive jurisdiction of another statutory regime, but the qualitatively different claim that the employees involved in the labor action were supervisors, not Sec. 2(3) employees. Ibid. The majority cites *Douglas Aircraft Co.*, 221 NLRB 1180 (1992), enfd. 35 F.3d 1148 (7th Cir. 1994), for the proposition that the Board has previously found ALPA to be a labor organization. ALPA was not a party in that case, however, and there is no indication in the decision that the question was litigated.

[3] In reciting the facts, the majority states that DHL responded to ALPA's grievance against it by "fil[ing] a declaratory judgment action in Federal district court." The majority fails to state that DHL proceeded *under the authority of the RLA*: DHL asserted that the dispute between the parties was a representation dispute within the jurisdiction of the National Mediation Board. Although not determinative, DHL's decision to proceed under the RLA instead of the NLRA is certainly noteworthy.

[4] Sec. 1 First, Sixth (45 U.S.C. Sec. 151 First, Sixth). Because the RLA does not proscribe secondary activity, the status of DHL under the RLA is not important.

[5] This case is the obverse of those cases that led to the 1959 amendment of Sec. 8(b)(4)(B), closing the "loophole" to cover "persons" and not just "employers." See *United Steelworkers of America v. NLRB*, 376 U.S. 492, 500–501 (1964), citing, e.g., *Great Northern Railway Co. v. NLRB*, 272 F.2d 741 (9th Cir. 1959). In those cases, a primary NLRA dispute (between a labor organization and an NLRA employer) was expanded to a secondary RLA rail carrier, with appeals to its employees. There, NLRB assertion of jurisdiction made sense because the NLRA proscribes secondary boycotts in aid of a primary dispute. But where the primary labor dispute is between RLA covered parties**,** as here, asserting jurisdiction would both serve no purpose under the NLRA and undermine Congress' determination to leave secondary conduct unregulated under the RLA.

for asserting jurisdiction over the dispute, and Supreme Court precedent counsels against it. We should decline to decide this case.

Dated, Washington, D.C. August 27, 2005

Wilma B. Liebman, Member

NATIONAL LABOR RELATIONS BOARD

Eric A. Taylor, Esq., for the General Counsel.

Jerry D. Anker, Esq. and *R. Russell Bailey, Esq. (Air Line Pilots Association, Int'l)*, of Washington, D.C., and *David M. Cook, Esq. (David M. Cook, LLC)*, of Cincinnati, Ohio, for the Respondent.

Norman A. Quandt, Esq. (Ford & Harrison LLP), of Atlanta, Georgia, *Charles I. Cohen, Esq.* and *Jonathan C. Fritts, Esq. (Morgan, Lewis & Bockius LLP)*, of Washington, D.C., and *Scott A. Carroll, Esq. (Vorys, Sater, Seymour & Pease LLP)*, of Cincinnati, Ohio, for the Charging Party.

DECISION

STATEMENT OF THE CASE

JOSEPH GONTRAM, Administrative Law Judge. This case was tried in Cincinnati, Ohio, on March 10 and 11, 2004. The charge was filed September 10, 2003, and the complaint was issued December 10, 2003.[1] The complaint charges that the Air Line Pilots Association (ALPA or the Respondent) has violated Section 8(b)(4)(ii)(A) and (B) of the National Labor Relations Act (the Act) by attempting to force DHL Holdings (USA), Inc., including DHL Worldwide Express, Inc., a wholly-owned subsidiary, to condition its operation of the package delivery business of its newly acquired subsidiary, Airborne Express, Inc., on the subsidiary's insistence that the air transportation aspects of the business be handled by ALPA pilots. ABX Air, Inc. (ABX) handles the air transportation aspects of Airborne Express' package delivery business. ALPA maintains that the Railway Labor Act (RLA) governs its conduct, not the National Labor Relations Act. ALPA further denies that it violated the Act, and maintains that its actions properly sought to enforce the scope clause of its collective-bargaining agreement with DHL Airways, Inc. ALPA maintains that the scope clause is a valid work preservation provision, it applies to ABX's air transportation services for Airborne Express, and it requires that ALPA members operate such air transportation services.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, Respondent, and Charging Party, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent admits and I find that DHL Worldwide Express, Inc. (referred to as DHL Holdings) is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. The Respondent also admits that it is a labor organization within the meaning of Section 2(5) of the Act. The Respondent disputes jurisdiction on the ground that its conduct is not governed by the Act. This contention is addressed below.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Stipulation

The parties have stipulated to the following facts.[2]

1. In 1990, Respondent Air Line Pilots Association (ALPA) was certified by the National Mediation Board, pursuant to the Railway Labor Act, as the collective-bargaining representative of the pilots employed by DHL Airways, Inc. (DHL Airways).

2. At the time ALPA was certified, DHL Airways was a wholly-owned subsidiary of a holding company then known as DHL Worldwide Express, Inc. and now known as DHL Holdings (USA), Inc. (To avoid confusion with another entity, described below, also named DHL Worldwide Express, Inc., this stipulation will refer to the holding company throughout as (DHL Holdings).)

3. DHL Holdings operates an integrated freight handling business under the brand name DHL Express.

4. The principal business of the DHL Holdings' network is the rapid pickup, sorting, and carriage on a time definite basis of documents, small parcels, and other freight by air, ground, and other means.

5. Prior to March 2001, both the ground operations (i.e., pickup, sorting, loading, and delivery of freight) and the air operations associated with DHL Holdings' business in the United States were performed by DHL Airways.

6. In December 1998, ALPA entered into a collective-bargaining agreement with DHL Airways covering its pilots.

7. Contemporaneous with entering into the ALPA/DHL Airways collective-bargaining agreement, DHL Holdings (then known as DHL Worldwide Express, Inc.) executed a letter of agreement.

8. In March 2001, DHL Holdings' business in the U.S. was restructured.

9. The March restructuring was necessary because DHL International, Ltd., a foreign entity, desired to acquire majority ownership of the DHL Holdings' network. Under U.S. law, a minimum of 75 percent of the voting power and 55 percent of the equity in a U.S. airline must be in the hands of U.S. citizens.

10. In the March 2001 restructuring, DHL Holdings sold 75 percent of the voting interest and 55 percent of the equity interest of DHL Airways to a U.S. citizen, William Robinson. At the same time, DHL Holdings transferred DHL Airways' assets related to its ground operations to a newly created wholly-owned subsidiary to which it gave the name DHL Worldwide Express, Inc. (DHL Worldwide), leaving DHL Airways with only the assets related to its air operations.

11. As a result of the March 2001 restructuring, the approximately 9000 employees of DHL Airways who had per-

[1] All dates are in 2003 unless otherwise indicated.

[2] References to attached exhibits have been omitted. The exhibits and the unabridged stipulation are contained in J. Exh. 1.

formed its ground operations (such as pickup, sorting, loading, and delivery) became employees of DHL Worldwide, but continued to perform roughly the same work they had previously performed. The approximately 1,000 employees of DHL Airways who had performed air operations remained employees of DHL Airways performing roughly the same work they had previously performed.

12. Contemporaneously with the March 2001 restructuring, DHL Holding, DHL Worldwide, and DHL Airways entered into contractual arrangements with each other that enabled them jointly to continue to operate the DHL Holdings' air and ground transportation network in the U.S. in the same seamless manner that it had previously been operated by DHL Airways alone.

13. In March 2003, DHL Worldwide Express B.V., a Netherlands corporation that is the 100 percent owner of DHL Holdings, announced publicly that it had entered into an Agreement and Plan of Merger (Merger Agreement) with Airborne, Inc. (Airborne).

14. At the time of the Merger Agreement, Airborne was an independent, publicly owned company engaged in the business of providing time-sensitive delivery of documents, letters, small packages, and freight to virtually every U.S. ZIP code and more than 200 countries worldwide.

15. Under the Merger Agreement, and in order to comply with the same citizenship requirements set forth in paragraph 9, Airborne agreed to separate its airline subsidiary, known as ABX Air, Inc. (ABX), after which Airborne—now consisting only of ground operations—was to become a new subsidiary of DHL Holdings.

16. The detailed terms of the Merger Agreement and related documents were set forth in a proxy statement sent to Airborne shareholders in July 2003.

17. In a transaction independent of the DHL-Airborne merger, DHL Holdings sold its remaining shares of DHL Airways, Inc. on July 14, 2003. Following that transaction, 100 percent of the ownership and control of DHL Airways, Inc. was held by a group of independent investors headed by its Chief Executive John Dasburg.

18. The new owners of DHL Airways changed the name of the company to ASTAR Air Cargo, Inc. (ASTAR).

19. ASTAR entered into a new Aircraft, Maintenance and Insurance (ACMI) Agreement setting forth the terms of its freight hauling services with DHL Worldwide, effective as of July 14, 2003.

20. ABX was separated from Airborne and became an independent publicly-owned company effective August 15, 2003.

21. The acquisition of Airborne by DHL Worldwide Express, B.V., pursuant to the Merger Agreement, was consummated on August 15, 2003.

22. ABX, upon its separation from Airborne, entered into its own ACMI Agreement with DHL Holdings' new wholly-owned subsidiary Airborne, Inc. effective August 15, 2002. This ACMI Agreement sets forth the terms of ABX's freight hauling services on behalf of DHL Holdings.

23. In addition to the ACMI agreement referred to in paragraph 22, ABX entered into a Hub and Line Service Agreement with DHL Holdings' new wholly-owned subsidiary, Airborne, Inc., effective August 15, 2003.

24. On June 16, 2003, ALPA sent a letter to John Fellows, CEO of DHL Holdings and DHL Worldwide.

25. Fellows responded to ALPA in an undated letter sent on or about June 27, 2003.

26. Pursuant to the correspondence referred to in paragraphs 24 and 25, a meeting was held on August 7 between representatives of DHL Holdings, DHL Worldwide, and ALPA.

27. At the conclusion of the meeting of August 7, 2003, the ALPA representatives handed the DHL representatives a letter and grievance dated August 7.

28. On August 11, 2003, DHL Holdings and DHL Worldwide filed a complaint against ALPA in the United States District Court for the Southern District of New York.

29. On August 18, 2003, ALPA filed an Answer and Counter Claims for Immediate Injunctive Relief. ALPA also filed a motion for a temporary restraining order and a preliminary injunction. That entire action is now stayed pending resolution of the instant charge.

30. On August 18, 2003, Judge Loretta A. Preska of the United States District Court for the Southern District of New York denied ALPA's Motion for a Temporary Restraining Order and scheduled and entered an Order to Show Cause scheduling a hearing on August 28, 2003, on whether a preliminary injunction should be entered as requested by ALPA.

31. At the conclusion of the hearing on August 28, 2003, Judge Preska orally requested further briefs and ordered a further hearing to be held on September 4, 2003.

32. On September 3, 2003, ABX filed an unfair labor practice charge against ALPA in Case 9–CE–65.

33. At the conclusion of the court hearing on September 4, Judge Preska orally stayed all further proceedings pending the decision of the NLRB on the unfair labor practice charge.

34. ABX withdrew the 8(e) charge in Case 9–CE–65 and filed a charge in Case 9–CC–1660 upon which a complaint issued and which is the subject of the instant proceedings.

35. DHL Holdings has begun the process of combining the ground operations of Airborne with the ground operations of DHL Worldwide into one integrated rapid freight system under the brand name DHL Express.

36. ABX and ASTAR are independent companies that since August 15, 2003 compete for the air freight services required by DHL Holdings and its various subsidiaries.

37. ALPA is the oldest and largest labor organization representing airline pilots covered by the Railway Labor Act (RLA) in the United States. Presently, ALPA represents over 62,000 airline pilots under the RLA. ALPA also represents approximately 17 airline pilots at a company in Albuquerque, New Mexico called Ross Aviation, Inc. (Ross), which performs contract flying for the U.S. Department of Energy. Ross is not a carrier under the RLA, 45 U.S.C. Section 181. It is governed by the National Labor Relations Act (NLRA).

38. ALPA also represents in excess of 1000 non-RLA covered employees based in Canada who work for various Canadian airlines some of which regularly fly between points in Canada and points in the United States.

39. On September 4, 1996, ALPA filed an unfair labor practice charge against Ross alleging that Ross engaged in certain conduct violative of Section 8(a)(5) and 8(d) of the NLRA. Subsequently the Regional Director for Region 28 of the National Labor Relations Board issued a "Complaint and Notice of Hearing" based on the allegations of the charge filed by ALPA.

40. On December 19, 2003, Administrative Law Judge Burton S. Kolko of the United States Department of Transportation issued a "Recommended Decision" finding that ASTAR Air Cargo, Inc. is a citizen of the United States and is not controlled by DHL Holdings or any affiliated entity.

41. At all times on and after August 7, 2003, DHL Holdings, DHL Worldwide, and Airborne (as it existed both before and after the August 15 merger) have been employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the NLRA.

B. Additional facts

1. Background

In 1998, DHL Holdings, the parent holding company of DHL Airways, had a small share of the time sensitive freight hauling business in the United States. Also in 1998, DHL Airways and ALPA entered into a collective-bargaining agreement that covered DHL Airways flight crew employees—pilots, copilots, and flight engineers. After the execution of that agreement, DHL Holdings agreed, on behalf of itself and its successors, to be bound by the agreement's "scope" language. The scope language of the collective-bargaining agreement (sec. 1.B) provides in pertinent part as follows:

> 1. Except as provided in paragraph B.4, all present and future flying performed on behalf of the Company or any affiliate . . . shall be performed by pilots whose names appear on the Pilots' System Seniority List in accordance with the terms and conditions set forth in this Agreement.
>
> 2. It is the Company's intent to handle permanent increases in volume through the acquisition of additional airlift capacity rather than subcontracting, and to use pilots on the Pilots' System Seniority List to the maximum extent possible.[3]

With respect to successorship, the agreement provides as follows (sec. 1.D):

> This Agreement shall be binding upon any successor, including without limitation, any merged company or companies, assignee, purchaser, transferee, administrator, receiver, executor, and/or trustee of the Company or DHL Worldwide Express, Inc. (such entity to be deemed a "successor"). The Company and DHL Worldwide Express, Inc. shall require a successor to assume and be bound by all the terms of this Agreement as a condition of any transaction that results in a successor.

The letter agreement signed by DHL Holdings is dated December 21, 1998 and provides in pertinent part as follows:

> Worldwide [herein called DHL Holdings—see paragraph 2 of the stipulation], which owns and/or controls Airways, agrees that it and any of its successors (as defined in Section 1 of the Agreement) hereby adopt and agree to be bound by all terms and conditions provided in Section 1 of the Agreement.
>
> It is further expressly agreed that any disputes which arise out of grievances or out of interpretation or application of this Letter or Section 1 of the Agreement between ALPA and Worldwide and/or Airways will be subject to determination in accordance with Section 1.F of the Agreement.

Section 1.F of the Agreement provides that grievances filed by ALPA alleging violations of section 1 shall be submitted to binding arbitration.

After the restructuring and the merger in August 2003, DHL Worldwide Express and Airborne were wholly-owned ground transportation subsidiaries of DHL Holdings. Both ground transportation entities utilize the same brand (DHL Express) in conducting their activities. On the other hand, ASTAR and ABX are airline companies that are separate and independent from each other and from DHL Holdings. Each airline has a separate long-term ACMI agreement with one of DHL Holdings' ground transportation subsidiaries; ASTAR's ACMI agreement is with DHL Worldwide Express, Inc. and ABX's ACMI agreement is with Airborne, Inc.

2. Different operations of ASTAR and ABX

ASTAR, formerly a subsidiary of DHL Holdings, is an independent air carrier engaged in the air freight transportation business.[4] ASTAR operates approximately 38 aircraft from its base at the Cincinnati/Northern Kentucky International Airport (CVG), and employs 450–500 flight crew personnel who are represented by ALPA.[5] ASTAR serves approximately 33 cities and flies an average of about 900,000 pounds of freight per night. ASTAR has never flown into ABX's hub in Wilmington,

[3] ALPA maintains that the following paragraph in the scope provision of the collective-bargaining agreement is relevant to this case.

> 4.e. If the Company commits to acquire an aircraft that will result in a net addition to the number of aircraft being operated by the pilots on the Pilots' System Seniority List, the Company may charter an aircraft of comparable or smaller size, range and cargo-carrying capacity for a reasonable period of time, not to exceed one (1) year, required to lease or purchase the additional aircraft and train the necessary crews. . . . ALPA agrees to meet and confer with the Company in the event that the Company wishes to extend a charter pursuant to this exception beyond one (1) year.

However, there is no evidence that DHL Holdings or DHL Worldwide has committed to acquire aircraft. Other than showing how the parties agreed to resolve the impact on ALPA members of the acquisition by DHL Airways of additional aircraft, this paragraph is not relevant to the issues in this case.

[4] On May 13, 2004, the Department of Labor affirmed the administrative law judge's conclusion that ASTAR is not controlled by DHL Holdings or any entity affiliated with DHL Holdings. *DHL Airways, Inc. n/k/a ASTAR Air Cargo, Inc*., Docket OST–2002–13089. In any event, ALPA does not contend otherwise. (See Stipulation 36.)

[5] All of the data relating to the operations of ASTAR and ABX are effective the date of the merger with Airborne, August 15, 2003.

Ohio to pick up or deliver freight, and it does not fly into or out of the regional hubs that ABX serves to pick up or deliver freight. Indeed, ASTAR does not have a system of regional hubs. Contrary to ABX, ASTAR does not supply its own ground transportation system and does not load its aircraft. Instead, DHL Worldwide handles all ground operations for ASTAR.

ABX, formerly a subsidiary of Airborne, is an independent air carrier engaged in the air freight transportation business. ABX's fleet consists of 115 aircraft, with an additional two aircraft undergoing modification. Of these 115 aircraft, 99 of them fly in and out of ABX's Wilmington, Ohio hub on a nightly basis. Another 9 or 10 aircraft fly in and out of the Wilmington hub on a daily basis as part of ABX's daytime operation. ABX serves approximately 105 cities and flies an average of 2.7 million pounds of freight per night from and into its Wilmington hub. ABX employs about 7200 employees, with about 6000 being employed at the Wilmington hub. About 750 of these employees are flight crew personnel. In addition to the Wilmington hub, ABX operates a regional hub network in which it flies freight into and out of 11 regional hubs spread throughout the United States. On a daily basis, ABX transports about 1.8 million pieces of freight weighing about 8.5 million pounds for Airborne.

ABX transports its freight in proprietary unit load devices (ULDs) known as "C" containers. ABX holds a patent on the "C" container. The type of ULD used most widely in the freight hauling industry is the "A" container. "C" containers are approximately one sixth the size of an "A" container. ABX's principal competitors, including ASTAR, Federal Express, and United Parcel Service, use "A" containers in the transportation of freight. ABX and ASTAR specially configure their aircraft to handle "C" containers and "A" containers respectively. The different containers necessitate different types of structural reinforcement and restraint systems for the purpose of supporting the weight of the containers and securing the containers in the aircraft. Also, "C" containers are designed to fit through conventional passenger doors on aircraft whereas "A" containers require the installation of larger cargo doors. Because of the different restraint systems and weight capacities for the "A" and the "C" containers, aircraft designed to handle "A" containers cannot handle "C" containers, and vice versa.[6] Similarly, "A" containers and "C" containers cannot be intermixed on the same aircraft. Retrofitting aircraft to handle one type of container as opposed to another is both expensive and time consuming, if it could be done at all.

The sort of facilities at Wilmington are not designed to handle the containers flown by the ASTAR aircraft just as the sort facilities at CVG are not designed to handle the containers flown by the ABX aircraft. Moreover, the sort capacity in Wilmington is approximately four times the capacity of the sort facilities at CVG. In addition, the process of loading an aircraft is different when using "C" as opposed to "A" containers. ABX has developed a unique conveyor belt system for loading its aircraft with "C" containers. ABX also holds a patent on this "C" container loading system. By contrast, "A" containers are loaded by a device called a "K" loader, which is an elevator that lifts the container up to the level of the aircraft. These differences in, and incompatibility between, the sort facilities and the retrofitted aircraft handling the different containers used by ASTAR and ABX applies throughout the various airports to which ASTAR's and ABX's aircraft are flown.

ABX supplies its own ground transportation system through the use of independent contractors and trucking companies. These companies, numbering approximately 150 to 200, provide personnel and about 1500 trucks to transport freight by ground within the areas covered by ABX's regional hubs.

All of the aircraft flown by ASTAR require three-person flight crews. On the other hand, all of the aircraft flown by ABX, except for 17 DC-8s, require two-person crews. ABX's aircraft and pilots have a higher category rating than ASTAR's pilots and aircraft. All of ABX's aircraft and pilots are certified as category II, and some as category III, which allows them to land when there is less visibility. ASTAR's pilots and aircraft are rated as category I, which limits the pilots' ability to fly in bad weather because category I pilots require enhanced visibility in order to land their aircraft.

ALPA has long represented the flight crew personnel of ASTAR and its predecessor, DHL Airways. ALPA has never been certified or recognized as the collective-bargaining representative of any of ABX's employees. Since approximately 1983, the International Brotherhood of Teamsters, Local 1224, has represented the ABX flight crews for purposes of collective bargaining. There is no relationship between Teamsters Local 1224 and ALPA.

The work that ABX performs for DHL Holdings, through its Airborne subsidiary, accounts for 99 percent of ABX's revenue. ABX has total annual revenue of about $1 billion, so the work it performs for DHL Holdings is worth about $990 million. If ALPA's position were to prevail, and if ABX were to lose its business with Airborne, ABX would face dire and possibly fatal consequences, especially with the market for its aircraft being, at best, limited. The impact on DHL Holdings would also be severe. The substantial deficit in the number of necessary aircraft, a deficit that could not be rectified before the passage of considerable time, is simply the most prominent of the many reasons why ASTAR would be unable and incapable of handling ABX's freight hauling business. ASTAR would be unable to carry about 2 million pounds of DHL Holdings' customer freight (out of a total of 3.6 million pounds) that is supposed to move by air every night. Should this occur, it is not unreasonable to infer further, and perhaps fatal, consequences to DHL's freight hauling business in the United States from the resulting loss of customer confidence.

3. Procedural status and issues

On June 16, 2003, ALPA sent a letter to DHL Holdings setting forth its claim that the proposed merger between DHL and Airborne would require Airborne to use ASTAR's ALPA pilots for all Airborne's flying. ALPA based its claim on (1) ALPA's

[6] It is possible, through the use of pallets, to adapt aircraft carrying "A" containers to be able to carry "C" containers. However, the evidence fails to demonstrate whether such adaptations are economically feasible or cost effective. Moreover, regulatory constraints apply to and limit modifications to aircraft.

collective-bargaining agreement with DHL Airways and (2) DHL Holdings' agreement to be bound by the scope clause in that collective-bargaining agreement. DHL Holdings did not agree with ALPA's claim, and on August 7 ALPA presented a formal grievance to DHL Holdings. This grievance claimed that implementation of the ACMI agreement between ABX and Airborne, Inc. would be a direct violation of the scope clause of the collective-bargaining agreement between ALPA and DHL Airways, to which DHL Worldwide is bound as the successor to DHL Airways, and to which DHL Holdings is bound by virtue of its December 21, 1998 letter agreement. The grievance further claimed that ALPA pilots employed by ASTAR should perform all flying for Airborne.

On August 11, DHL Holdings filed a declaratory judgment action in the United States District Court for the Southern District of New York, Case No. 03-CV-6082 (LAP), seeking a determination that the collective-bargaining agreement does not prohibit ABX from providing air transportation services for DHL Holdings' postmerger Airborne subsidiary. On August 18, ALPA filed an answer and counterclaim seeking (1) an order to compel expedited arbitration of its grievance with DHL Holdings and DHL Worldwide, and (2) an injunction to restrain DHL Holdings and its subsidiaries from contracting air transportation services to ABX until the arbitration has been concluded.

On August 28, a hearing was held before District Judge Loretta A. Preska. During the course of that hearing, ALPA reiterated and made clear its position that only ALPA members employed by ASTAR could fly the freight for Airborne that had previously and was presently being flown by the Teamsters Union flight crews of ABX. ALPA takes this position undeterred by the fact that the many differences in the size, operations, pilot qualifications, and capabilities of ASTAR, ABX, and their respective pilots render ALPA incapable of handling much of the ABX flying that ALPA claims for itself.

ABX filed an unfair labor charge with the Board prior to the resumption of the hearing before Judge Preska. District Judge Preska then stayed further proceedings pending the resolution of the present charge. The issues are (1) whether the Board has jurisdiction over this dispute and, if so, (2) whether ALPA's August 7 grievance and August 18 counterclaim are unfair labor practices under Section 8(b)(4)(ii)(A) and (B) of the Act.

III. ANALYSIS

A. Jurisdiction

Section 8(b) of the Act prohibits unfair labor practices by "labor organizations" or their agents. Accordingly, the initial question is whether ALPA is a "labor organization," and the resolution of this question is straightforward, if only deceptively so.

Section 2(5) of the Act defines a labor organization as follows:

> The term "labor organization" means any organization of any kind . . . in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

The definition of labor organization is to be interpreted and applied broadly. *Electromation, Inc*., 309 NLRB 990, 992 (1992), enfd. 35 F.3d 1148 (7th Cir. 1994). ALPA has admitted in this proceeding that it is a labor organization.[7] Moreover, the Board has found, in cases unrelated to the present proceeding, that ALPA is a labor organization under Section 2(5). *Douglas Aircraft Co*., 221 NLRB 1180 (1975); see *Sis-Q Flying Service*, 197 NLRB 195 (1972). Accordingly, these factors support a finding that ALPA is a labor organization under the Act. See *Masters, Mates & Pilots Local 47 (Chicago Calumet Stevedoring Co.)*, 125 NLRB 113, 132 fn. 19 (1959); *Pacific Far East Line*, 174 NLRB 1168 (1969).

ALPA represents approximately 17 employees of Ross Aviation, Inc. Ross Aviation is not covered by the RLA and its pilots are employees within the meaning of Section 2(3) of the Act. In 1996, ALPA filed an unfair labor practice charge with the Board on behalf of these employees. ALPA filed the unfair labor practice charge against Ross Aviation, at least in part, to protect its status as the labor organization that was the exclusive bargaining representative pursuant to the Act of the Ross employees. This factor also supports a finding that ALPA is a labor organization under the Act. See *Masters, Mates & Pilots Local 47 (Chicago Calumet Stevedoring Co.)*, supra at 132.

ALPA argues that neither Ross nor its employees have any connection with the facts or circumstances of the present case. However, this happenstance does not change ALPA's status in this case as a labor organization. "[T]he status of the individuals involved in an organization's *dispute* is not one of the requirements set forth in the statutory definition of a labor organization. The requirement is merely that it be an organization in which 'employees' *participate*." [emphases in original]). *Masters, Mates & Pilots Local 47 (Chicago Calumet Stevedoring Co.)*, supra at 132; *National Marine Engineers Beneficial Assn. v. NLRB*, 274 F.2d 167 (2d Cir. 1960), enfg. 121 NLRB 208 (1958); see also *Production Workers, Local 707 (Checker Taxi)*, 283 NLRB 340 (1987).

The statute's prerequisite that employees participate does not set forth any minimum number of such employees that are necessary to meet the statutory definition. Similarly, the Board has not established any minimum number of employees that are necessary to meet the definition. See *Masters, Mates & Pilots Local 47 (Chicago Calumet Stevedoring Co*., 146 NLRB 116, 118 (1964); *Masters, Mates & Pilots Local 47 (Chicago Calumet Stevedoring Co*., 144 NLRB 1172 (1963). Nor has the Board attempted to impose other types of numerical prerequisites, such as "substantial number," on the number or percentage of employees necessary to constitute a "labor organization." Id.; *Pacific Far East Line*, supra; see *Teamsters Local 87 (DiGiorgio Wine Co.)*, 87 NLRB 720, 721 (1949) ("Although Teamsters 87 admits to membership, and claims to represent, DiGiorgio's agricultural laborers, it also numbers among its members employees of other employers in Southern California.

[7] Tr. 50. (References to the transcript of the hearing are designated as Tr.). ALPA qualified this admission by stating, "at least for some purposes we're a labor organization." However, ALPA's qualification only concerned the effect of the admission, not ALPA's status as a labor organization under the Act.

It clearly, therefore, falls within the Act's definition of a labor organization.")

In short, with respect to the statutory definition that employees participate, the Ross Aviation pilots are "employees," and they "participate" as evidenced by their designation of ALPA as their exclusive bargaining representative. With respect to the Act's requirement that the organization deal with employers concerning conditions of employment, the allegations of the unfair labor practice charge filed by ALPA against Ross Aviation demonstrate that ALPA fulfills this requirement. Moreover, ALPA does not dispute that its Ross Aviation members participate in ALPA nor does ALPA dispute that it deals with Ross Aviation concerning conditions of employment. See also *Production Workers, Local 707 (Checker Taxi)*, 273 NLRB 1178, 1179 (1984), remanded on other grounds 793 F.2d 323 (DC Cir. 1986) (in admitting that they were labor organizations, the Respondents "avow[ed] that they exist at least in part for the purposes set forth in Section 2(5) of the Act"). Accordingly, ALPA falls within the statutory definition of labor organization.

ALPA, while acknowledging that it is a labor organization under the Act, argues that under *Railroad Trainmen v. Jacksonville Terminal Co*., 394 U.S. 369 (1969), the Board does not have jurisdiction of this dispute. In *Jacksonville Terminal*, the terminal company sought a State court injunction to prevent the unions, which were involved in a labor dispute with a railroad company, from picketing the terminal used by the railroad company. All three of these entities—the unions, the railroad company, and the terminal company—were subject to the Railway Labor Act (RLA). The State court issued the injunction. The Supreme Court reversed on the ground that the RLA, which governed the picketing, protected the picketing from State proscription.

Before addressing the application of the RLA, the court held that the jurisdiction of the State court was not ousted by the primary and exclusive jurisdiction of the National Labor Relations Board. The unions' national membership included a small percentage of employees who were not subject to the RLA, and who were possibly subject to the NLRA. The unions argued that this was sufficient to "bring the present dispute arguably within the NLRA, and they assert that until the National Labor Relations Board decides otherwise, no court may assume jurisdiction over the controversy." Id. at 375–376. The Supreme Court rejected this contention and stated, "And when the traditional railway labor organizations act on behalf of employees subject to the Railway Labor Act in a dispute with carriers subject to the Railway Labor Act, the organizations must be deemed, *pro tanto*, exempt from the National Labor Relations Act." Id. at 376–377. The court continued, "This is a railway labor dispute, pure and simple [and] . . . the NLRA has no direct application to the present case." Id. at 377.

Jacksonville Terminal is inapposite and does not direct a conclusion that the Board lacks jurisdiction over the present dispute. In the present case, ALPA is allegedly threatening DHL Holdings and its subsidiaries, employers within the meaning of Section 2(2), (6), and (7) of the NLRA, with the object of forcing these employers to stop doing business with ABX, at least insofar as ABX's work force is presently represented for purposes of collective bargaining. Accordingly, all the parties to this proceeding are not subject to the RLA as they were in *Jacksonville Terminal*, and this is not a "railway labor dispute, pure and simple." Moreover, in *Jacksonville Terminal*, the Supreme Court was presented with a case that was initiated by the terminal company, where the Board had not intervened or asserted jurisdiction, and where the application of the NLRA to the dispute was, at best, arguable. On the other hand, the Board initiated the present proceeding, and the application of the NLRA to this proceeding is more certain, especially in light of ALPA's status as a labor organization under the Act and DHL Holdings' status as an employer under the Act.

The assertion of jurisdiction is also consistent with Board precedent. *Electrical Workers (B. B. McCormick & Sons)*, 150 NLRB 363 (1964), involved a charge against unions whose membership was composed of statutory and nonstatutory employees. The Board held that the unions violated Section 8(b)(4)(B) of the Act when they engaged in a secondary boycott against an employer covered by the Act, even though the primary employer was subject to the RLA. The Board also held that the unions' actions were subject to the Act even though their "primary dispute was with an employer subject to the Railway Labor Act and whose employees are not 'employees' under the National Labor Relations Act." Id. at 372. The facts of the present case are like the facts in *B. B. McCormick* in that ALPA represents both statutory and nonstatutory employees, ALPA is (allegedly) engaged in secondary activity against a neutral employer (DHL Holdings) that is subject to the Act, and it's primary dispute is with ABX, an employer subject to the RLA, whose employees are not employees under the Act. See also *Masters, Mates & Pilots Local 47 (Chicago Calumet Stevedoring Co.)*, 125 NLRB 113 (1959).

As the General Counsel accurately states in his posthearing brief, the present case "involves a Section 2(5) labor organization's [alleged] coercion of Section 2(2) employers to enter into an 8(e) agreement and to cease doing business in violation of the NLRA." Thus, *Jacksonville Terminal* is not controlling, and Board precedent as well as the plain language of the statute, which, in any event, is to be broadly applied, support the assertion of jurisdiction over the present dispute. Under these circumstances, and for all the foregoing reasons, I conclude that the Board has jurisdiction to hear and determine the present alleged violation of Section 8(b)(4)(ii)(A) and (B).

B. Unfair Labor Practices

The complaint charges that ALPA's grievance and federal court counterclaim violated Section 8(b)(4)(ii)(A) and (B) of the Act. These provisions, along with Section 8(e), constitute the secondary boycott prohibitions of the Act. Section 8(b)(4)(ii)(A) and (B) makes it unlawful for a labor organization

> (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—
>
> > (A) forcing or requiring any employer or self-employed person to join any labor or employer organization or to enter into any agreement which is prohibited by section 8(e);

> (B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9. . . .

Section 8(e) makes it unlawful for a labor organization and an employer to enter into any contract or agreement, express or implied, whereby such employer ceases or agrees to cease doing business with any other person.

ALPA has sought, in its grievance and in its federal court counterclaim, to enforce an interpretation and application of the scope clause in its collective-bargaining agreement with DHL Worldwide and DHL Holdings in the following manner: to require DHL Holdings and DHL Worldwide to terminate its subsidiary's contract with ABX, pursuant to which ABX provides flying services for Airborne, flying that has traditionally and is presently being done by Teamsters members, and to assign this flying to ALPA members. The filing of a grievance and resorting to arbitration are actions within the meaning of Section 8(b)(4)(ii)'s prohibition against threatening, coercing, or restraining any person engaged in commerce. *Newspaper & Mail Deliverers (New York Post)*, 337 NLRB 608, 608 (2002); *Service Employees Local 32B-32J (Nevins Realty)*, 313 NLRB 392, 392 (1993); *Elevator Constructors (Long Elevator)*, 289 NLRB 1095, 1095 (1988), enfd. 902 F.2d 1297 (8th Cir. 1990); see *Teamsters Local 705 v. NLRB (Emery Air Freight)*, 820 F.2d 448 (D.C. Cir. 1987) (distinguishing between having an unlawful motive in filing a grievance and seeking to enforce an unlawful contract provision). The remaining question is whether ALPA's actions in filing its grievance and seeking to compel arbitration had an object of unlawfully forcing ABX to cease doing business with Airborne, a subsidiary of DHL.

Section 8(b)(4)(ii) expresses "the dual congressional objectives of preserving the right of labor organizations to bring pressure to bear on offending employers in primary labor disputes and of shielding unoffending employers and others from pressures in controversies not their own." *NLRB v. Denver Building Trades Council*, 341 U.S. 675, 692 (1951) (addressing Sec. 8(b)(4)(A), the predecessor to Sec. 8(b)(4)(ii)(B)). Similarly, Section 8(e) only bars agreements with a secondary purpose, which are distinguished by actions "directed against a neutral employer, including the immediate employer when in fact the activity directed against him was carried on for its effect elsewhere." *National Woodwork Mfrs. Assn. v. NLRB*, 386 U.S. 612, 632 (1967). Nevertheless, the statute does not prohibit primary disputes, such as disputes over the preservation of bargaining unit work for bargaining unit employees. Id. at 635. In determining whether the scope clause in ALPA's collective-bargaining agreement is a lawful work preservation agreement or is tactically calculated to satisfy union objectives elsewhere, the status of the parties should first be explained.

ABX is the primary employer in ALPA's grievance and counterclaim because ALPA seeks the ABX flying positions for its members. See also *Teamsters Local 705 (Emery Air Freight)*, 278 NLRB 1303, 1304 fn. 7 (1986), remanded in part on other grounds, *Truck Drivers Union Local 705 v. NLRB*, 820 F.2d 448 (D.C. Cir. 1987) (the Board noted that the union, which was disputing the subcontracting of work to a nonunionized company, did not represent the employees of the nonunionized company, and found that the union's primary dispute was with that nonunionized company). It is not necessary that ALPA be engaged in an actual dispute with ABX in order for ABX to be the primary employer in this secondary boycott analysis, "so long as the tactical object of the agreement and its maintenance is that employer." *National Woodwork Mfrs. Assn. v. NLRB*, supra at 645. In the present case, the tactical object of ALPA's grievance and counterclaim is the air transportation service performed by the Teamsters pilots who work for ABX.

On the other hand, ALPA does not have a dispute with DHL concerning the terms and conditions of employment of ALPA members employed by DHL. Nor is ALPA seeking to preserve jobs that have been lost because no jobs have been lost. ALPA claims that it is seeking to "preserve" for itself the jobs of an airline that does business with DHL, and therefore, the scope clause is a valid work preservation clause. However, ALPA's claim does not apply to a real loss of jobs, but rather, and at best, to a loss of the opportunity for additional jobs from an independent company. This type of "loss" is not within the meaning of a lawful work preservation agreement. See *Nat'l. Woodwork Mfrs. Assn. v. NLRB*, supra at 630–631 ("We therefore have no occasion today to decide the questions which might arise where the workers carry on a boycott to reach out to monopolize jobs or acquire new job tasks when their own jobs are not threatened by the boycotted product."); *Teamsters Local 25 (Emery Worldwide)*, 289 NLRB 1395, 1397 (1988) ("[W]e do not find that Local 25's object was to preserve work for its members employed by Emery because, as of August 12, the date Local 25 began pressuring Emery, Emery employees had not lost any work.") Indeed, ALPA's claim (that the scope clause in its collective-bargaining agreement requires that ALPA members must handle the flying for airline companies with whom DHL does business) uses the scope clause "as a sword, to reach out and monopolize all the [flying] job tasks for [ALPA] members." *Nat'l. Woodwork Mfrs. Assn. v. NLRB*, supra at 630, citing *Allen Bradley Co. v. Electrical Workers Local 3*, 325 U.S. 797 (1945).

A lawful work preservation agreement must pass two tests. "First, it must have as its objective the preservation of work traditionally performed by employees represented by the union. Second, the contracting employer must have the power to give the employees the work in question—the so–called 'right of control' test." *NLRB v. Longshoremen*, 447 U.S. 490, 504 (1980). ALPA's actions satisfy neither of these tests. With respect to the right of control test, DHL, the neutral party who ALPA is attempting to coerce and restrain, does not have control over the labor relations of ABX and its employees. ABX is an independent airline company and has negotiated its own collective-bargaining agreement with the Teamsters Union.

Thus, DHL does not have the power to assign the flying performed for ABX to ALPA members.

With respect to the first test, ALPA members have not traditionally performed flying duties for ABX. Indeed, there is no evidence that ALPA members have ever performed flying duties for ABX. Moreover, in determining the lawfulness of an alleged work preservation agreement, "[t]he touchstone is whether the agreement or its maintenance is addressed to the labor relations of the contracting employer vis–a–vis his own employees." *Nat'l. Woodwork Mfrs. Assn. v. NLRB*, supra at 644–645. As noted above, ALPA's dispute does not concern the terms and conditions of bargaining unit members, but rather the union affiliation of ABX's employees, who are presently members of the Teamsters Union.

The lawfulness of work preservation agreements most often arises when employees' traditional work is displaced or threatened by technological innovation. See *NLRB v. Longshoremen*, supra at 505. The present case does not involve a technological innovation, nor have there been any displaced workers, unless, of course, ALPA were allowed the opportunity to, and did, prevail in the claim asserted in its grievance and counterclaim. Nevertheless, in determining whether the scope clause has as its objective the preservation of work traditionally performed by employees represented by ALPA, it is proper to consider whether the work is "fairly claimable" by ALPA. E.g., *Food & Commercial Workers Local 367 (Quality Food)*, 333 NLRB 771 (2001). "Fairly claimable work is work that is identical to or very similar to that already performed by the bargaining unit and that bargaining unit members have the necessary skill and are otherwise able to perform." *Newspaper & Mail Deliverers (Hudson County News)*, 298 NLRB 564, 566 (1990).

Work that is traditionally performed by bargaining unit employees, for the employer, and at the employer's facility, has been found to be fairly claimable. *Retail Employees Local 876 (Allied Supermarkets)*, 174 NLRB 424, 425 (1969) (in-store shelving and servicing work within the employer's supermarkets); *Hudson County News*, supra (distribution of additional publications within the same geographic area). Conversely, the Board has found that work is not fairly claimable where it has historically been performed by other employees, requires additional skills, is performed on different equipment, or is performed outside the bargaining unit's traditional worksites. E.g., *Nevins Realty*, supra (work was not historically performed by bargaining unit members); *Sheet Metal Workers Local 27 (Aerosonics, Inc.)*, 321 NLRB 540 (1996) (prefabricated metal work that had not been performed by members of the bargaining unit); *Teamsters Local 705 (Emery Air Freight)*, supra at 1304–1305 (delivery work that had previously been subcontracted, but which was essentially the same as the work performed by bargaining unit members); *New York Post*, supra (work that was the same as the work performed by bargaining unit members, but in a different locality).

The ALPA bargaining unit members do not perform the flying for ABX, and as far as the record in this case discloses, have never performed flying for ABX. ALPA members have different skills and certifications than ABX's Teamsters pilots, and these would affect their ability to perform the flying services in the same manner as the Teamsters pilots do. ALPA members perform their jobs on different equipment than the ABX pilots, including different airplanes, different reconfigurations to airplanes, different loading mechanisms, and different containers that hold the freight. Finally, the ABX pilots perform their jobs at different worksites since they fly to many more and many different destinations and utilize different hubs than ALPA pilots. For all these reasons, the work sought by ALPA in its grievance and counterclaim is not fairly claimable, and the mere fact that the work is similar does not affect this conclusion. See also *Teamsters Local 282 (D. Fortunato, Inc.)*, 197 NLRB 673, 678 (1972) ("[T]he fact that the driving of one truck may well be similar to, and require like skills as, the driving of any other truck does not persuade us that all driving work is therefore 'fairly claimable' by a unit of drivers.")

ALPA argues that the core issue in this case is whether ALPA's conduct is primary or secondary in character, and that its primary dispute is with DHL over a valid contractual provision that requires DHL to utilize ALPA members for all flying performed by DHL or its successors. This argument ignores ALPA's contention in its grievance and counterclaim that all flying services by ABX, or presumably any other independent airline that would enter into an ACMI agreement with Airborne, must be performed by ALPA members. ALPA's position in its grievance and counterclaim expands the reach of the scope clause to include not only flying done by DHL, but also flying done by independent airline companies with whom DHL or its subsidiaries have flying agreements. Accordingly, the validity or lawfulness of the scope clause is not the issue, but rather, ALPA's conduct in seeking enforcement according to its present interpretation of the clause. *NLRB v. Enterprise Assn. of Steam Pipefitters Local 638*, 429 U.S. 507, 519 (1977) (recognizing the continuing validity of the proposition that a valid contract does not immunize conduct otherwise violative of the statutory prohibition against secondary conduct). The secondary and unlawful aspect of ALPA's action in filing a grievance against DHL is its intention to require DHL to cease doing business with ABX, at least insofar as the pilots of ABX are not represented for collective-bargaining purposes by ALPA.

ALPA's primary dispute is with ABX because that airline company has an agreement to provide flying services for a subsidiary of DHL, and it does not employ ALPA members. DHL is the neutral party through whom ALPA seeks to pressure ABX at the risk of ceasing business with DHL. DHL is not the party with whom ALPA has its primary dispute despite the fact that ALPA's collective-bargaining agreement with DHL is the means through which ALPA seeks to apply its pressure. ALPA, by seeking to apply its collective-bargaining agreement in a way that would violate Section 8(e) of the Act, cannot escape liability for its actions by cloaking the primary object and opponent of its dispute in the mantle of that agreement.

ALPA acknowledges that a union violates Section 8(b)(4)(ii)(A) and (B) of the Act if the object of its actions is to force a secondary or neutral employer to stop doing business with a primary employer with whom the union is engaged in a labor dispute. Yet, this is the conduct in which ALPA has engaged by filing its grievance and its counterclaim. Indeed, ALPA does not argue to the contrary. Rather, ALPA argues that despite its object in filing the grievance and counterclaim,

the scope clause in the collective-bargaining agreement it seeks to enforce is a valid attempt to preserve work for its members, thus taking it out of the secondary boycott prohibitions of the statute. However, as I have found above, ALPA's interpretation of the scope clause, including its subsequent attempts to enforce that interpretation, does not have work preservation as its object, either legally or factually. ALPA's actions "were an unambiguous attempt to force [DHL], a neutral employer, to cease doing business with [ABX] or any other [airline] company that did not have a contract with the Respondent." *Teamsters Local 705 (Emery Air Freight)*, 278 NLRB at 1304.[8] Or, to paraphrase the Supreme Court, ALPA's grievance and counterclaim were directed against a neutral employer, which in this case was its immediate employer, DHL, when in fact the activity directed against DHL was carried on for its effect elsewhere, viz., the representation of pilots employed by ABX. *Nat'l. Woodwork Mfrs. Assn. v. NLRB*, supra at 632.

Accordingly, ALPA has violated Section 8(b)(4)(ii)(A) and (B) of the Act by filing a grievance in which it seeks to prohibit DHL Holdings and DHL Worldwide, and its subsidiary, Airborne, Inc., from entering into and complying with an agreement for ABX to provide flying services to Airborne, Inc. because ABX does not employ ALPA members, and by filing a counterclaim in federal district court in which ALPA seeks to compel arbitration of its grievance.

CONCLUSIONS OF LAW

1. At all times during the commission of the unfair labor practices set forth, DHL Holdings, DHL Worldwide, and Airborne (as it existed both before and after the August 15 merger) have been employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the NLRA, and have been persons and employers within the meaning of Section 8(b)(4)(ii)(A) and (B).

2. The Respondent is a labor organization within the meaning of Section 2(5) of the Act.

3. By filing a grievance and a counterclaim against DHL Holdings and DHL Worldwide with an object to force or require DHL Holdings and DHL Worldwide to enter into and comply with an agreement prohibited by Section 8(e) of the Act, the Respondent has threatened, coerced, and restrained DHL Holdings and DHL Worldwide, and has engaged in unfair labor practices affecting commerce within the meaning of Section 8(b)(4)(ii)(A) and Section 2(6) and (7) of the Act.

4. By filing a grievance and a counterclaim against DHL Holdings and DHL Worldwide with an object to force or require DHL Holdings and DHL Worldwide to cease doing business with ABX, Inc., or alternatively, to force or require ABX, Inc. to recognize or bargain with the Respondent as the representative of its employees, the Respondent has threatened, coerced, and restrained DHL Holdings and DHL Worldwide, and has engaged in unfair labor practices affecting commerce within the meaning of Section 8(b)(4)(ii)(B) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. I shall recommend that the Respondent withdraw its August 7, 2003 grievance and its August 18, 2003 counterclaim filed in the United States District Court for the Southern District of New York. I shall also recommend that the Respondent reimburse DHL Holdings and DHL Worldwide for all reasonable expenses and legal fees, with interest, incurred in defending against the grievance and counterclaim. *Teamsters Local 776 (Rite Aid)*, 305 NLRB 832, 835 fn. 10 (1991).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[9]

ORDER

The Respondent, Air Line Pilots Association, AFL–CIO, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Seeking to enforce or apply, through grievance or arbitration, any collective-bargaining agreement with DHL Worldwide Express, Inc. or DHL Holdings (USA), Inc., where an object thereof is to force or require DHL Worldwide Express, Inc. or DHL Holdings (USA), Inc. or their subsidiaries to cease doing business with ABX Air, Inc. or any other person.

(b) In any like or related manner violating Section 8(b)(4)(ii)(A) or (B) of the Act

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Withdraw the August 7, 2003 grievance against DHL Holdings (USA), Inc. and DHL Worldwide Express, Inc.

(b) Withdraw the August 18, 2003 counterclaim filed in the United States District Court for the Southern District of New York in Case No. 03-CV-6082 (LAP).

(c) Reimburse DHL Holdings and DHL Worldwide for all reasonable expenses and legal fees, with interest, incurred in defending against the August 7 grievance and August 18 counterclaim.

(d) Within 14 days after service by the Region, post at its union office copies of the attached notice marked "Appendix."[10] Copies of the notice, on forms provided by the Regional Director for Region 9, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immedi-

[8] As noted above, the Court of Appeals for the District of Columbia Circuit remanded the case, in part, to the Board to explain and distinguish between the union having an unlawful motive in filing a grievance and the union seeking to enforce an unlawful contract provision. This remand did not affect the Board's analysis regarding work preservation nor its holding that the union's actions in attempting to restrain Emery, viz., a strike, violated Sec. 8(b)(4)(ii)(B) of the Act.

[9] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[10] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

ately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to members are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Sign and return to the Regional Director sufficient copies of the notice for posting by ASTAR, if it is willing, at all places where notices to members are customarily posted.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C., July 2, 2004

APPENDIX

NOTICE TO MEMBERS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT attempt to enforce or apply our collective-bargaining agreement with DHL Holdings (USA), Inc. or DHL Worldwide Express, Inc. or any other employer if an object is to force DHL Holdings (USA), Inc. or DHL Worldwide Express, Inc. or any other person to cease doing business with any other person.

WE WILL NOT in any like or related manner violate Section 8(b)(4)(ii)(A) or (B) of the Act.